No. 82-1899

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees.

On Appeal from the Court of Appeals of the State of New York

REPLY OF APPELLANT TRANS WORLD AIRLINES, INC.

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Appellant, Trans World Airlines, Inc. (hereinafter "TWA"), herein responds to Appellees' Motion to Dismiss or Affirm and to the brief submitted by the Solicitor General for the United States as Amicus Curiae in support of Appellees' motion. TWA does not believe that anything contained in Appellees' two page argument in support of their motion warrants any response in addition to the arguments contained in TWA's Jurisdictional Statement. Accordingly, this Reply Brief will only address those arguments set forth in the Solicitor General's brief.

ARGUMENT

The Solicitor General's Misstatement of the Issue

Initially, it must be pointed out that the Solicitor General has misstated the question presented by this appeal. TWA *does not* contend that the New York Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81), is preempted or invalid "to the extent that it applies to flight attendants employed by interstate air carriers."[1] TWA's contention before this Court is that New York law is preempted or invalid only to the extent that it may be interpreted to require an alteration or abandonment of a policy adopted by an interstate air carrier solely for flight safety reasons. TWA *does not* here challenge the general applicability of the pregnancy discrimination provisions of New York's Human Rights Law as they might apply to TWA's employment relationship with its flight attendants in that state. TWA *does* contend that an application of New York's Human Rights Law to require the alteration or abandonment of an *admitted* flight safety rule: (i) encroaches upon a regulatory field occupied and preempted for exclusive federal control; (ii) conflicts with TWA's federal duty to conduct its operations with the highest possible degree of safety; and (iii) places an unconstitutional burden on interstate commerce.[2]

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[1] Brief for the United States as Amicus Curiae (hereinafter "Solicitor General's Brief") at I. That issue was resolved in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963). An issue similar to the one in this appeal would have been present in that case if Colorado law had been interpreted so as to require Continental to abandon certain of its non-FAA required pilot safety requirements on the ground that they had a disparate impact on black pilots. Such an issue was neither addressed nor decided in *Colorado Anti-Discrimination Comm'n.* Indeed, the Solicitor General's misstatement of the issue here helps explain his reliance on that inapposite case.

[2] TWA also contends that the proceedings below operated to deny it due process of law in violation of the Fourteenth Amendment to the United States Constitution. U.S. Const. amend. XIV, § 1. The

The Preemption Claims

For reasons that are unclear, the Solicitor General never directly addresses the essential points made by TWA with respect to the preemption issues. For example, the Solicitor General never specifically takes a position on whether the field of air carrier flight safety has been preempted by congressional action for exclusive federal regulation. While the Solicitor General is careful not to specifically disavow preemption of the field of in-flight safety, his arguments amount to exactly that. The gist of his position is that there is no preemption here because the FAA has not "thus far" elected to regulate the specific subject matter involved in this case. (Solicitor General's Brief at 7). The clear implication is that at least until the FAA specifically regulates on a matter of air safety then the states are free to do so. But whether the FAA has adopted specific standards for pregnant flight attendants begs the question whether such standards are within a field reserved by Congress for exclusive federal control—the issue presented by this appeal.

As demonstrated more fully in TWA's Jurisdictional Statement (J.S. at 14-19), the paramount federal interest in facilitating unencumbered interstate travel by maintaining uniform regulation of interstate air carriers, coupled with the pervasiveness of the federal regulatory scheme, makes it clear that Congress intended to totally preempt and occupy the field of interstate air safety to the exclusion of state action. New York's attempted regulation of TWA's maternity leave policy for flight attendants encroaches upon this regulatory field and presents substantial federal questions for decision by this Court.

The Solicitor General's emphasis on the absence of specific FAA standards for pregnant flight attendants totally ignores the federal safety obligations imposed on TWA not through the FAA, but directly by federal stat-

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Solicitor General takes no position on this issue. Solicitor General's Brief at 13 n.9.

ute. Nowhere in the Solicitor General's Brief is any reference made to the duty resting upon air carriers to perform their services "with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b) (1976); *see also* 49 U.S.C. §§ 1302(a)(1), (2), 1303(a), 1348(a), (c), 1424(a), (b) (1976). Although this duty is at the very heart of the "federal air safety regulatory scheme currently in effect," the Solicitor General fails to acknowledge that it is even a part of that scheme at all.

The Solicitor General makes no mention of the fact that TWA is under a federal duty to institute safety policies in addition to FAA *minimums*. Indeed, the entire thrust of Section 601 of the Federal Aviation Act[3] is that FAA rules and regulations are *minimums* for air carriers and are not designed to supplant but rather to supplement the "duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b).[4]

The Solicitor General demonstrates a similar misapprehension of the issues by stating that the resolution of the flight attendant-pregnancy question is "peripheral" to flight safety.[5] A brief examination of the court deci-

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[3] 49 U.S.C. § 1421 (the federal statute authorizing and requiring the Administrator of the Federal Aviation Administration to promulgate rules and regulations).

[4] TWA also maintains that the application of New York's HRL to require a modification of its maternity leave policy for flight attendants creates a direct substantive conflict with TWA's federal safety obligations and is thus preempted. (J.S. at 19-23). Inasmuch as the Solicitor General totally ignores TWA's federal statutory obligations, it is not surprising that he also fails to address the direct conflict issue.

[5] The Solicitor General's citation to *Airline Pilots Association v. Trans World Airlines, Inc.*, 713 F.2d 940 (2d Cir. 1983) and *Tuohy v. Ford Motor Co.*, 675 F.2d 842 (6th Cir. 1982) also indicates the degree to which he has misapprehended the issues presented in this appeal. These cases involved employer-instituted flight safety rules not specifically required by any FAA regulation and an attack on those rules by plaintiffs asserting federal rights

sions which have dealt with the flight attendant pregnancy question shows this statement to be wholly untenable. As noted in TWA's Jurisdictional Statement, several courts have agreed with TWA's position that federal air safety obligations require leave upon first knowledge of pregnancy, while other decisions have found that safety does not require a blanket rule until the 13th, 20th or 26th week of pregnancy. (J.S. at 12 & 13 n.3). But every one of these decisions has held that, for the flight attendant position, unlike other jobs, a blanket mandatory maternity leave policy is justified *at some point in pregnancy*, notwithstanding the absence of specific FAA regulation on the subject. While there are disagreements as to when this point is reached, everyone agrees that at some point individualized treatment of pregnant flight attendants is unsafe and that a line must be drawn. Although the issue presented in this appeal is not about where that line should be drawn but rather about who may draw it, to say that the resolution of either question is "peripheral" to air safety is simply indefensible.

In essence, the Solicitor General argues that except in areas of specific FAA rulemaking, the field of inflight safety is open to concurrent regulation on both the federal and state levels. TWA respectfully submits that the Solicitor General's position is not only irreconcilable with the congressional scheme, but that it is both shortsighted and dangerous. While interstate air carriers and the FAA are charged by federal law with a duty to acquire and exercise expertize in the highly specialized area of

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under the *federal* Age Discrimination in Employment Act of 1967. 29 U.S.C. §§ 621-34 (1976) Neither case involved any state laws and the courts were simply required to reconcile arguably conflicting federal duties under well-developed rules of statutory construction. TWA does not contend that the Federal Aviation Act preempts the field of flight safety to the exclusion of other federal legislation but only that it preempts the field for federal regulation of whatever kind. The cases cited by the Solicitor General simply have nothing to do with the issue here and his reliance upon them is puzzling.

flight safety, the same cannot be said of state agencies such as the New York State Division of Human Rights. As the Division's cavalier treatment of the safety evidence and issues below amply demonstrates,[6] it is simply unfit to promulgate safety rules for the airline industry and Congress could not have intended for it to do so.

The Commerce Clause Claim

No less puzzling than his position on federal preemption is the Solicitor General's attack on TWA's Commerce Clause claim. (*See* J.S. at 23-27). Although he attempts to show that there is no real potential for conflicting state regulation, his argument lacks internal consistency. On the one hand, the Solicitor General argues that a state, in the exercise of its traditional police powers, may require an interstate air carrier to abandon or modify air safety policies under the guise of regulating employment discrimination. He later argues that another state, in the exercise of that same police power, may not require an air carrier to adopt a similar policy for safety reasons. (*See* Solicitor General's Brief at 11 n.6). No reason is offered for this distinction and no valid reason is apparent.[7] A state's use of its police power to impose safety measures on common carriers is at least as widely recognized as a state's use of its police power to outlaw safety measures for a different reason. Moreover, the Solicitor General's suggestion that TWA could avoid problems with conflicting state laws by "complying with the

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[6] *See* J.S. at 27-32.

[7] The Solicitor General apparently assumes that a hypothetical California law requiring leave upon first knowledge of pregnancy would be in conflict with the pregnancy discrimination provisions of Title VII. *See* 42 U.S.C. 2000e(k) (Supp. V 1981). But he offers no authority for this assumption and there appears to be none in light of the decisions in *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980) and *Air Line Pilots Association v. Western Air Lines, Inc.*, No. 80-4043 (9th Cir. July 16, 1983), each of which arose out of flight operations in the State of California and held that mandatory leave for flight attendants upon first knowledge of pregnancy did not violate Title VII.

most stringent requirement," simply misses the point that this is no solution when the requirements run in opposite directions.

Finally, the Solicitor General asserts that since "varying results in Title VII cases apparently have not imposed intolerable burdens on interstate air commerce," differing state law requirements should not do so either. (Solicitor General's Brief at 12-13). This assertion demonstrates a misunderstanding of both the way in which interstate air carriers operate and the legal effect of the orders in the referenced Title VII cases. The diverse results reached in the Title VII cases apply to different air carriers, not to different jurisdictions in which a single air carrier operates. No air carrier has been ordered in any Title VII case to institute a different maternity leave cutoff date for flight attendants in the different states in which it operates. Such a result could only occur if different states were allowed to impose different cutoff dates for the same airline, and it is precisely the threat of this result which TWA contends would place an intolerable burden on interstate commerce.

In sum, there is a real and substantial possibility that TWA could face conflicting regulations with regard to the timing of maternity leave for flight attendants. Under these circumstances, New York's attempted regulation of TWA's policy is prohibited by the Commerce Clause. U.S. Const. art I, § 8, cl. 3.

Respectfully submitted,

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